No. 21774

United States
COURT OF APPEALS
for the Ninth Circuit

ADELBERT G. CLOSTERMANN,
Executor of the Estate of Charles W. Feist,
deceased,

Appellant,

v.

THE GATES RUBBER COMPANY,
a Colorado corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Chief Judge

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SUMMARY OF ARGUMENT

The absorption of Columbine, Inc. into defendant The Gates Rubber Co. is questioned because Columbine was in fact doing business in Oregon after January 31, 1965.

If there was an absorption so Gates was actually engaged in a hazardous occupation, then Gates was

subject to the Act; but was not *protected* by the Act. Gates was a non-complying separate entity employer. Gates would not be protected until it had filed the statutory notice of engaging in a hazardous occupation the same as any complying employer.

Any SIAC claim filed after the three-month period of limitation with no showing of tardiness on behalf of the claimant is a nullity.

A workman injured while in the employ of a non-complying employer then may receive SIAC benefits without limiting his rights against his employer.

1. The District Court erred in holding that Columbine was merged into Gates Rubber Company on January 31, 1965.

Evidence revealed that Columbine was operating Bud's Tire Exchange, Inc. in Medford until March 9th, 1965 (Pl. Ex. 45, 46, 47, 48, 49) and therefore was doing business within the State of Oregon.

> "A foreign corporation is 'doing business' within Oregon whenever an important combination of functions is being performed therein such as ownership, possession or control of property, dealing with others in reference to property, the execution of contracts, etc." 22 Opinion Atty. Gen. (Ore.) 1944-46. Page 336

Columbine failed to comply with the provisions of the Oregon Statutes pertaining to the notification to the Oregon Corporation Commissioner of "merger," "dissolution" or "liquidation."

Bud's Tire Exchange held itself out to the Circuit

Court of Oregon as a Colorado corporation (Pl. Ex. 43) in 1964. Evidence reveals it to be neither a Colorado corporation nor an Oregon corporation (Pl. Ex. 14, 35).

Columbine filed its withdrawal from Oregon on April 21, 1965 and backdated its ceasing of business to January 31, 1965 (Pl. Ex. 18).

Columbine continued as an operating Colorado corporation after the purported merger, consolidation or liquidation (Pl. Ex. 20, 20a, 34).

2. Gates did not have the protection of SIAC

Prior to January 31, 1965 Gates had rejected the Act (Tr. 4) and thereafter had not filed its compliance with the Act so as to receive *protection* under the Act until May 24, 1965 (SIAC File No. 2 Ex. 40) at which time Gates became a complying employer by filing the statutory notice for the purpose of engaging in a hazardous industry.

(a) Concerning Gates and Feist being subject to the Act at the time of injury.

Gates having previously rejected the Act, could only come within the provisions of SIAC by the questioned "dissolution" of Columbine. Even if Columbine had "merged" with Gates, Gates would still be denied the *protection* of the Act because of its failure to comply with the statute by filing the required statuory notice of engaging in a hazardous industry. Gates, however, would be *subject* to the provisions of the Act

because it was engaging in a hazardous industry without the sanctity of statutory qualification.

This is significant because the injured employee thus is given the benefit of suing the non-complying employer in addition to receiving SIAC benefits.

Obviously Gates and Columbine were separate legal entities. Automatic *coverage* is afforded an employer engaged in a hazardous industry, but not automatic *protection*. The employer must raise his own shield by filing the statutory application with SIAC to obtain the protection, otherwise he is a non-complying employer (See ORS 656.052 (4) (5)). Gates is attempting to lean on Columbine for protection.

Feist was never an employee of Columbine (Tr. 42). Feist never made any contributions under the Act. Gates never made contributions under the Act prior to the injury.

The SIAC claim for Feist (Def. Ex. 9) (SIAC file No. 2, Ex. 77, 78, 80) was submitted by Gates. Feist thought that document was a claim for Employer's Mutual (Tr. 42).

Appellee relies on *Bandy* v. *Norris, Beggs and Simpson*, 222 Or. 1, 19, 342 P.2d 839 (1960). That case is distinguished from the instant case in that in the *Bandy* case, plaintiff was actually protected under the Act by reason of a SIAC policy taken out prior to the injury by her employer; and the claim being timely filed. The defendant Norris, Beggs and Simpson were merely the real estate agents of the em-

ployer. The plaintiff sought to circumvent the employee-employer relationship and seek a remedy against an agent.

In the instant case Gates could only be subject to the act by the questioned absorption of Columbine; yet Gates is denied the protection of the Act, by its failure to apply for the protection.

(b) A statutory exception pursuant to ORS 656.312 exists in favor of Feist.

The statutory exception exists because either Columbine was a separate legal entity; or Gates was an applicant for SIAC insurance under ORS 656.052. Obviously, Gates was a non-complying employer because it failed to file the statutory notice until May 24, 1965. Therefore, plaintiff may proceed under ORS 656.054 and Liability of Employer for Injuries arising prior to the filing of the notice under ORS 656.052.

Feist was never employed by Columbine. There was no filing for protection by Gates until after the injury occurred. There was no evidence of record that Columbine was subsidiary of Gates prior to the injury. Hence, if Gates actually absorbed Columbine, then Gates was engaging for the first time in a hazardous industry *subject* to but not within the *protection* of the Act. Gates was a separate entity employer.

Gates prepared and filed the claim for SIAC benefits which was signed by Feist without the benefit of counsel on May 20th, 1965 (Def. Ex. 9, and SIAC File No. 2, Ex. 77, 78, 80) in excess of the limitation of time for the filing of such claims.

The filing of a claim in excess of the statutory limitation was a nullity—*Johnson* v. *SIAC*, — Or. —, 425 P.2d 496 (1967).

Feist did not file the claim, nor did he show any excuse for tardiness. There can be no waiver of the time limitation either by the Court or administrative agency (See *Johnson* v. *SIAC*).

Hence, Gates may not take advantage of its filing the Feist claim and by that method deny unto Feist his remedy under the statute. The District Judge did not have the advantage of this later opinion which clearly interprets the Oregon Law.

SIAC has a statutory lien on any recovery by Feist against the defendant; hence there is no occasion for Feist reimbursing SIAC until recovery is had against Gates (ORS 656.314).

(c) The District Court erred in denying the motion for a new trial.

Clearly, the *Bandy* case does not apply because there both parties were previously covered and protected under the Act and prior to the injury.

In the case at bar, Gates was *subject* to the Act only by the questioned absorption of Columbine. It, nevertheless, did not gain the *protection* of the Act as in the *Bandy* case, until Gates had provided SIAC with the statutory application that it was engaging in a hazardous industry.

Feist never changed his theory as evidenced by his

original complaint. There is no evidence that Columbine was, prior to the injury, in any way affiliated with Gates, both being separate corporations.

3. An employer is precluded from protection of the Act when he files a claim after the limitation.

A filing by an employer is clearly a nullity in accordance with the opinion of the Oregon Supreme Court in *Johnson* v. *SIAC*, — Or. —, 425 P.2d 496 (1967). There can now be no confusion in the law or application of the law (ORS 656.274(1)).

Any filing after the limitation is a nullity. This would include an application for rehearing. So any processing or consideration of a claim by SIAC would not limit or deny an injured workman, such as Feist from pursuing his common law remedy and recovery against a non-complying employer.

CONCLUSION

Appellant is entitled to receive the benefit of a SIAC payment and in accordance with statute and proceed against a non-complying employer. Gates contributions to SIAC were only made "after" the injury. The application for re-hearing was a nullity because the claim was filed by Gates after the statutory time limitation.

The statute itself provides plaintiff the very remedy which he is seeking.

Therefore this Court should reverse the judgment

of the District Court, amend the judgment to include the statutory exception, or grant a new trial on the segregated issue.

Respectfully submitted,

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Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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